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RACE, RIOTS AND THE RULE OF LAW

DEBORAH WAIRE POST*

I cried when I heard the decision in the Rodney King case.¹ I cried because I am the mother of a black youth who is on the threshold of manhood. Christopher, my son, recently experienced a surge of testosterone. He grew several inches and developed a thin dark line of hair above his lip. His voice startles me because it is so unfamiliar, so unlike the sweet voice of the little boy I have lived with for fourteen years.

I cried when I heard the verdict in the Rodney King case because I am a lawyer and I know the power of presumptions.² This particular

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1. *People v. Powell*, No. BA-035498 (Cal. Sup. Ct. 1992).

2. See generally the discussion of presumptions as legal fictions in LON FULLER, *LEGAL FICTIONS* (1967). Presumptions are legal fictions, generalizations drawn from real life that are applied in situations where the state of facts assumed in the generalization does not exist. *Id.* at 41. In the case of Rodney King, the presumption that black men are dangerous was imbedded in the defense's arguments that: the police were justified in believing that (1) Rodney King was guilty of some crime because they had to engage in a high speed chase to apprehend him and (2) Rodney King was on PCP, a drug which would have endowed him with super-strength and made him oblivious to pain. Both assumptions proved to be false. Yet the jury used them to justify the response of the police.

Fuller distinguishes between expository and emotive legal fictions. *Id.* at 53-56. Emotive fictions are persuasive because they make us feel that a particular result is "just and proper." *Id.* at 54. It is an epistemological freeway. By-passing reason and self-conscious consideration, emotive fictions are directly knowable. They attach themselves to ideas which are a matter of faith; values and beliefs to which we are committed emotionally. An older woman from the town where I live with my son expressed the presumption the following way: "I think we see a black man as a destructive thing. That's my opinion as a white person. They're the ones that are usually apprehended as criminals." Alvin E. Bes- sent, *L.I.'s Great Divide: Poll on Race Relations Finds Pessimism, and a Chasm*, *NEWSDAY*, May 17, 1992, at 51.

We could treat this idea that black men are dangerous as a rebuttable presumption and arguably, that is what the jury did in the Rodney King case. As Fuller points out, the acceptance of someone else's inference without putting that person to the task of proving the facts has an effect on the administration of justice. Procedure can affect the outcome; the result in the case is often determined by the assignment of the burden of proof to one side or the other. *Id.* at 45.

We could test the basic premise of the presumption, examining the data or facts which are the basis for the generalization. Certainly, there is a perception that Blacks commit more crimes than whites and that Blacks are disproportionately represented in the criminal justice system and the prisons in this country. The reasonableness of a fear based on this data can be questioned if there is evidence, which is unrelated to their predisposition toward violence, to explain the disproportionate representation of Blacks in the criminal justice system. See generally Candace Kruttschnitt, *Criminal Justice System: Social Determinants*, in 2 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 470-76 (Sanford H. Kadish ed., 1983); Charles V. Willie & Ozzie L. Edwards, *Race and Crime* in 4 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1347-50 (Sanford H. Kadish ed., 1983) (a bibliography and summary discussion of the

presumption puts my son's life at risk, even more than before. This jury

sociological work done in the area of criminal law, the relationship between race and class and the effect of both at various points in the criminal justice system). See also the following articles that deal with racial bias and the effect it has on the criminal justice system: Dwight L. Greene, *Abusive Prosecutors: Gender, Race and Class Discretion and the Prosecution of Drug Addicted Mothers*, 39 BUFF. L. REV. 737 (1991); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983); Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749 (1992) ("gang profiling" as a means of identifying and labeling dangerous men and the impact on Black, Latino and Asian men).

The statistical data on the number of black men who are arrested, prosecuted and convicted of crimes is suspect because racism is pervasive throughout the criminal justice system. The presence and effect of racism makes the use of "neutral" statistics misleading and makes the efficacy of any presumption questionable. Even if the data were conclusive, it would not justify the use of a presumption, which operates as an excuse in any confrontation between a white police officer and a black man, placing the burden on the black man to show that the presumption did not apply in a particular case. For an example of such a presumption in operation, see a discussion of the experiences of black men on the campus of Duke University in Jerome McCristal Culp, Jr., *Notes from California: Rodney King and the Race Question*, 70 DENV. U. L. REV. 199 (1993). See also Diana Jean Schemo, *Singling Out Blacks Where Few Are To Be Found*, N.Y. TIMES, Oct. 20, 1992, at B1 (describing the incident at Oneonta College where college officials gave the names of 125 black male students to police investigating an attempted rape).

It is important to consider why we use presumptions. Concerns with efficiency, stability and superior access to proof underlie presumptions. MCCORMICK ON EVIDENCE § 343 (John William Strong ed., 4th ed. 1992). At the heart of each rationale is some calculation of the effect on or cost to society and the injustices which might result because of the use of a presumption. In a criminal case, concerns with due process protect the defendant from presumptions which might lower the state's standard of proof. Defendants can offer an affirmative defense; but, I know of no instance where a presumption, a fact inferred from the existence of other facts, operates to exonerate a defendant from a crime. See generally MCCORMICK §§ 346-48. Arguably, any presumption supported by these particular facts, for example the ugly empirically verifiable reality of racism, would serve to perpetuate the advantage and the power, including the power of life and death, that police already have. The existence of such a presumption would invite physical abuse of any subordinated group.

Guido Calabresi has discussed the relationship between the reasonable person standard and racism in tort law. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW (1985). He concludes that the pull of Constitutional norms leads us to protect those beliefs which would usually seem idiosyncratic and that such norms are a significant factor in determining what is reasonable. *Id.* at 60. In an earlier section of the book that discusses insurance rates, Calabresi cites surrogate classifications for race (in the criminal law, these surrogates might focus on clothing or age or geographic location). Calabresi points out that:

[W]e are unwilling to admit openly that some groups in our flawed society may have attributes which are *undesirable and even dangerous*. However, because *we* are in a deep sense responsible for the existence of these attitudes, we would like both to deny their existence and to avoid hindering or excluding further those who have such attitudes. We would like to do this without in any way suggesting that the attitudes themselves are to be tolerated, let alone encouraged. It is this ambivalence that so often pushes us into subterfuges and wishful thinking.

Id. at 42-43.

I think that the problem in criminal law is similar. The law makes discrimination illegal and racism unconstitutional. If the law has no effect, the resentment, hostility and maybe even violence of black groups, may be both unreasonable and predictable. Black men are no more dangerous than any other human being. Some feel the problem stems from deprivation and anger. The black community, in particular, black men, currently bear the burden of racism, even though the illegal and immoral behavior of the white community is responsible for breeding the violence. It is a burden that is imposed through the use of presumptions like the one that labels all black men dangerous. Even if more black men than white men commit crimes; even if the proportion of black men com-

verdict, this acquittal, legitimizes the presumption that black men are dangerous.

When Christopher was in sixth grade, I had a parent/teacher conference with his homeroom/social studies teacher. I remember how surprised he was at what he called Chris' emotional development. In his words, Chris had "a very good sense of the human condition." He elaborated further, "Chris knows that people are not perfect; that the world is not perfect. He has great sympathy and understanding for people." It was not long after that meeting that Christopher came home from school, sat down at our kitchen table and confessed to me that he had thrown a classmate up against a locker. He did this when he heard his white classmate call a black girl, who was also in their class, a "nigger." The student did not understand Christopher's violent reaction. "Why are you angry?" he asked, "I didn't call you nigger?"

Chris had taken matters into his own hands. He administered a punishment that he thought appropriate; one that was likely to deter future transgressions. Chris never considered approaching the school authorities to report the incident that made him angry. Most children adhere to an unwritten code that discourages reporting such incidents to adults. As a parent, though, I felt I should have been able to say, "You should have reported it to the principal. There was no need to take matters into your own hands." I honestly could not tell him that. We both knew that students get detention for running in the halls, or for throwing food in the cafeteria, but there is no detention for engaging in hate speech.³ We both knew that the response of the principal would have been similar to that of the student. Arguably, my son experienced no harm. However, if his assault on his classmate had been reported to the principal, Chris would have had no defense.⁴

mitting crimes is greater than the proportion of white men committing crimes; even if black men are more dangerous than white men, young black men should be able to walk the streets and drive through neighborhoods without fear of the police. It is part of their right to what Calabresi calls the "unfettered participation" in the activities which are "essential to being a part of our society." *Id.* at 34.

3. The middle school in my school district has several kinds of sanctions available: (1) detention, which is the punishment imposed for the least serious delicts and (2) in-house suspension, a punishment, which is reserved for major transgressions. Detention occurs before or after school. In house suspension means the student spends the day in the "time out" room. Detention is used for relatively minor transgressions like food fights in the cafeteria or rude or disrespectful behavior (usually towards attendants and teachers' aides). Sometimes teachers and administrators are creative in making detention unpleasant. See, e.g., *Frank Sinatra: He's Still Crooning, But 90's Teens Sure Don't Swoon*, NEWSDAY, Sept. 22, 1992, 519 (teacher plays Frank Sinatra records during detention).

4. After I heard about an incident at an adjacent school district with a much more ethnically diverse student body, where a student was suspended for calling an Asian classmate a derogatory name, I felt it was only fair to test my assumption. I called the principal at my son's middle school, Mr. Nadler, and interviewed him. I told him what had happened to Chris and asked what he would have done. He said that the student who used the racial epithet would have been placed in the "time out" room. This would be viewed as an opportunity to re-educate the student, give him an opportunity to grow from the experience and talk about the impact of his actions on other people and the alternative choices available to him. Chris would have received the same punishment for the inappropriate use of force. I am not sure what effect my status as a law professor had on Mr. Nadler, but

Around commencement time last year, Chris and I listened to the remarks of President Bush in which he dismissed the need for regulations which would give us a remedy for racist remarks like the one uttered by Chris' white classmate. George Bush explained to us, and to all America, that the norms of civility are sufficient to control such behavior. People with "good breeding" do not call other people names.⁵ The President, the man who would defend America and the ideal of patriotism from political dissidents who burn the American flag, condemned hate speech regulations and reminded us that free speech is what democracy is all about.⁶

he commented that he would treat the behavior of the student who used the word "nigger" as a violation of the law. I did not correct him.

5. I found President Bush's remarks on free speech confusing and contradictory. He managed somehow to acknowledge, and then deny, the danger of racism in the same speech.

Ironically, on the 200th anniversary of our Bill of Rights, we find free speech under assault throughout the United States, including on some college campuses. . . . What began as a crusade for civility has soured into a cause of conflict and even censorship. . . . [P]olitical extremists roam the land, abusing the privilege of free speech. . . . Such bullying is outrageous. It's not worthy of a great nation grounded in the values of tolerance and respect. So, let us fight back against the boring politics of division and derision. Let's trust our friends and colleagues to respond to reason. As Americans we must use our persuasive powers to conquer bigotry once and for all. We must conquer the temptation to assign bad motives to people who disagree with us.

Remarks at the University of Michigan Commencement Ceremony in Ann Arbor, May 4, 1991, 27 WEEKLY COMP. PRES. DOC. 563, 565 (May 13, 1991).

6. President Bush was reacting to *Texas v. Johnson*, 491 U.S. 397 (1989), a Supreme Court decision which classified flag-burning as protected speech. A political brouhaha followed, punctuated by calls for a Constitutional Amendment to prevent such unpatriotic acts. There are other policies that I think reflect the ambivalence (or hypocrisy) of the past administration on speech-related matters. The Bush Administration supported the gag order that would deny federal funding to family planning centers that offer abortion counseling. The regulations adopted by the Health and Human Resources Administration, 42 C.F.R. § 59 (1991), withstood a constitutional challenge based on the First Amendment in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) and also a Congressional attempt to overturn them that President Bush vetoed. A concern for free speech (of doctors) was offered as a rationale for a memorandum issued by the President to the Secretary of Health and Human Services, which proposed four principles to govern the implementation of the regulations. Ultimately, these four principles, which were adopted by HHS, were the basis for declaratory relief from the gag order granted in a recent federal court decision. *National Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992) (failure to comply with the notice and comment procedures of the Administrative Procedure Act). Vice President Quayle was not concerned that his support for the police organizations advocating a boycott of Warner Records might chill the free speech of rappers like Ice-T, whose heavy metal band performs the song "Cop Killer." ICE-T AND BODY COUNT, *Cop Killer*, on BODY COUNT (Time-Warner Bros. 1992). See generally John Leland, *Rap and Race*, NEWSWEEK, June 29, 1992, at 47 (discussing the controversy).

I do not pretend to have expertise in the First Amendment arena. Certainly, I cannot engage in the kind of critique that has been offered by others who are much more knowledgeable on the subject. See, e.g., *State v. Mitchell*, 485 N.W.2d 807, 810 n.5 (Wis.), cert. granted, 61 U.S.L.W. 3435 (U.S. Dec. 12, 1992) (No. 92-515) (citing articles on the First Amendment); Jack M. Battaglia, *Regulation of Hate Speech by Educational Institutions: A Proposed Policy*, 31 SANTA CLARA L. REV. 345 (1991) (summarizing the literature on the subject); Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. CIN. L. REV. 1 (1991); see also Leslie Epstein, *Civility and Its Discontents: Offensive Speech on Campus*, AM. PROSPECT, Summer 1991, at 23; Franklyn S. Haiman, *The Remedy is More Speech*, AM. PROSPECT, Summer 1991, at 30; Cass R. Sunstein, *Ideas, Yes; Assaults, No*, AM. PROSPECT, Summer 1991, at 35 (debate among and between these three authors concerning the First Amendment).

I have observed the debate with a certain fascination, wondering why lawyers and law

If a balance must be struck between the competing values of equality and liberty, I personally think we ought to err in the direction of equality.⁷ But then, I think of prejudice as an infectious disease. There

professors never feel comfortable unless they have a classificatory system on which to rely to explain the choices that are made with respect to the government control over forms of speech. Why must we try to fit speech that we find pathological and socially dangerous within some pre-existing category devised by a court which may or may not choose to discuss the social values the categories are meant to promote or preserve. "In a sense, the entire jurisprudence of free speech reflects a general categorization, composed of assumptions about which kinds of communicative acts are inside the first amendment and which are outside." LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 940 (2d ed. 1988) (citing Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981)). Obviously, the attempt to tailor a statute to fit within a doctrine does not guarantee success. See, e.g., *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (city ordinance drafted with the assistance of Catherine MacKinnon to fit hate speech within the 'fighting words' category violated the Constitution).

First Amendment doctrine reveals much about the value choices we make as a nation and the commitment to traditional concepts of what is good and what is bad for the body politic. I have noted with some amazement the willingness of the Court to contemplate the possibility of valuelessness when speech involves human sexuality. The Court takes a two-track approach to obscenity—one that involves it in a discussion of the value of the speech and the harm that the speech can cause, while the other appears neutral, but is not. Even speech that might be protected can be regulated with zoning ordinances designed to protect the moral sensibilities of the community. TRIBE, *supra* at 934. The government need not tolerate speech that one might assume is political, and protected, if the Court chooses to focus on where the speech occurs, rather than what is being said or if it invokes the false dichotomy between speech and conduct. Compare *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir.), *cert. denied*, 111 S. Ct. 516 (1990) (municipality could regulate beggars to protect the public from the threatening and annoying conduct of the beggars, since begging was not protected speech) with *Loper v. New York City Police Department*, 802 F. Supp. 1029 (S.D.N.Y. 1992) (loitering ordinance unconstitutional because beggars were using the public streets. The court explicitly discusses the message communicated by the act of begging).

Courts almost universally reject the need for hate speech regulations even when they acknowledge the fact that such speech was traditionally or historically intended to intimidate and threaten particular communities within our society. *R.A.V.*, 112 S. Ct. at 2539-50; *UMW Post, Inc. v. Board of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989). Hate speech will never be unprotected as long as the Supreme Court thinks that the harm caused by the speech is offset by some positive value it places on that speech. Hate speech will continue to have value as long as it is considered "political" speech.

I suppose my disagreement with First Amendment absolutists is born of cynicism. Not all "political" dissidents deserve the protection of the First Amendment. True political dissidents seldom receive the protection they deserve. If exceptions exist, and clearly they do under a variety of doctrines, why not adopt an approach which brings the discussion of values out into the open. Antipathy towards the ideas contained in speech may be appropriate. President Bush supported a constitutional amendment which would have silenced one form of expression of dissatisfaction with the government. He, and others like him, believed unpatriotic behavior should be punished because it is more harmful than the speech of extremists who advocate genocide. Perhaps we should debate the values reflected in this choice.

7. *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989). Judge Cohn noted in his introduction that "[i]t is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict." *Id.* at 853.

If constitutional lawyers are unable to see equality as the more compelling interest in these cases, at the very least there should be a recognition that the hatred contained in such speech poses a significant danger to the survival of our nation. Hatred is the solvent that dissolves the bonds of a community; it causes death and destruction. Anyone who has any doubts on this subject need only to look at the tragedy that continues in what used to be Yugoslavia.

Justice Robert H. Jackson, perhaps because of the role he played in the Nuremberg

is no reasoning with hate. It is irrational. Racism and prejudice of every kind are forms of psychosis; flaws in the human psyche, which make those who suffer from them dangerous.

From my perspective as a member of a group threatened by the resurgence and growing violence of white supremacy groups, the threat to my liberty and my safety justifies a minor limitation on the freedom of a Skinhead or member of the Aryan Brotherhood to engage in hate speech. I would like to prevent, not avenge, the death of my son at the hands of some adolescent misfit who could be recruited and then persuaded to kick my son to death.⁸

The Republican administrations of Reagan and Bush, as well as the Justice Department and the judiciary they have transformed with their appointments, do not share my views. The invalidation of hate speech regulations is justified by denying the reality of my experience and the reality of racism. There is no official recognition of either the immediate harm done by such speech or the direct connection between such speech and violence against Blacks, Jews, women or homosexuals, to name others who are the object of hate speech and bias crimes.

It is hardly surprising that those who are at risk resort to self-help. After exhausting every legal argument available to block the march through Skokie, Illinois, the survivors of the holocaust resorted to self-help. They threw rocks at the Nazis whose free speech rights had been defended by the American Civil Liberties Union and vindicated by the federal courts.⁹ In 1992, the peaceful march in Denver on Martin Lu-

Trials, understood better than most the danger of hatred and the power of speech. He did not focus on the harm to the individual; rather he was concerned that if such speech went unchecked it would harm democratic institutions. Dissenting in *Terminiello v. Chicago*, 337 U.S. 1 (1948), he wrote:

[W]e must bear in mind also that no serious outbreak of mob violence, race rioting, lynching or public disorder is likely to get going without help of some speech-making to some mass of people. A street may be filled with men and women and the crowd still not be a mob. Unity of purpose, passion and hatred, which merges the many minds of a crowd into the mindlessness of a mob, almost invariably is supplied by speeches. It is naive, or worse, to teach that oratory with this object or effect is a service to liberty. No mob has ever protected any liberty, even its own, but if not put down it always winds up in an orgy of lawlessness which respects no liberties.

Id. at 32. Justice Jackson alluded to the misuse of liberty by those, like Goebbels, who had only disdain for the democracy, and continued:

In the long run, maintenance of free speech will be more endangered if the population can have no protection from the abuses which lead to violence. No liberty is made more secure by holding that its abuses are inseparable from its enjoyment. . . . The choice is not between order and liberty. It is between liberty with order and anarchy without either.

Id. at 37.

8. The two most celebrated civil suits against white supremacists were brought after a young black man, Michael Donald, was lynched in Alabama, and an Ethiopian student, Mulugeta Seraw, was kicked to death in Portland, Washington. In both cases, Morris Dees, of the Southern Poverty Law Center, sought damages which were designed to "compensate" the victims' parents and to drive the hate groups involved out of business. See, e.g., Don Duncan, *\$12 Million Bill for Metzger—White Supremacist Must Pay Murder Victim's Family*, SEATTLE TIMES, Oct. 23, 1990, at B1; Frank Judge, *Slaying the Dragon*, AM. LAW., Sept. 1987, at 83; Jesse Kornbluth, *The Woman Who Beat the Klan*, N.Y. TIMES MAG., Nov. 1, 1987, at 23; Richard E. Meyer, *The Long Crusade*, L.A. TIMES MAG., Dec. 3, 1989, at 14.

9. See ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE AND

ther King's Birthday erupted into violence as young people reacted to the presence of the Klan.¹⁰ Most recently, on the eve of the verdict in the Rodney King case, street gangs in Los Angeles shouted, "No justice, no peace."¹¹ Two years before the riots, my son threw a classmate up

THE RISKS OF FREEDOM (1979) (describing the lawsuit and the events leading up to the day when the march occurred). When the march was eventually held, members of the National Socialist Party in America, led by Frank Collin, were pelted with rocks and eggs.

10. On a day when more than 15,000 people turned out to honor the memory of Martin Luther King, the Klan planned a rally which was attended by 125 Klan members. The speeches by Klan leaders were heard by the faithful, the news media and counter-demonstrators who were on hand to protest the Klan rally. The leaders were spirited away, the Klan faithful fled through sub-basement tunnels under city buildings to a waiting bus. They were protected by the police as they entered the van and the protestors began throwing bottles and snowballs. Twenty-one of the protestors, six of whom were juveniles, were arrested by the police. It was reported that one protestor made the following comment about the racism of the police: "Those (expletive deleted) don't protect black people in their own neighborhood," but "[t]hey come out in record numbers to protect the KKK." John C. Ensslin & Mark Brown, *King Day Observance Explodes into a Riot, Confrontation is Worst in U.S. as Nation Honors Civil Rights Leader Who Preached Non-violence*, ROCKY MOUNTAIN NEWS, Jan. 21, 1991, at 6, 20 (the author of this article did not delete the expletive nor did the editors of the *Denver University Law Review*. It was deleted from the newspaper account of the disturbance). The newspaper report also described the protestors as "a ragtag collection of several hundred gang members, drunks and thugs" that went after the Klan and then the police. *Id.* at 6. Other reports referred to them as young people who did not understand Martin Luther King's message. Brian Weber, *King's Legacy Lost on Youth, Webb Says*, ROCKY MOUNTAIN NEWS, Jan. 22, 1992, at 8. Many of the "activists" blamed federal judge, U.S. District Court Judge Richard P. Matsch, for granting a permit to the Klan. Robert Jackson, *Violence Came as 'No Surprise'*, ROCKY MOUNTAIN NEWS, Jan. 22, 1992, at 23.

11. The phrase, "No Justice, No Peace," was chanted by many of the residents of South Central Los Angeles. Arguably, the looting, burning and destruction of property was attributable to both the lack of justice in the trial and the absence of "economic justice" within the community. Jonathan Peterson & Hector Tobar, *South L.A. Burns and Grieves*, L.A. TIMES, May 1, 1992, at A1.

When I first saw the films of the riot and heard the chant, "No Justice, No Peace," it seemed appropriate. I never stopped to think about the source of the phrase. "No Justice, No Peace" has been labeled the "activist mantra." Jonathan Rieder, *Crown of Thorns: The Roots of the Black Jewish Feud*, NEW REPUBLIC, Oct. 14, 1991, at 26. I was surprised, I suppose, by the level of political consciousness it revealed. Somehow I did not expect that from young people living in poverty. I expected passivity, lethargy, hedonism and hopelessness; I expected something that looked like the "culture of poverty" academics and politicians decry. See, e.g., FRANK LEVY, *DOLLARS AND DREAMS: THE CHANGING AMERICAN INCOME DISTRIBUTION* (1987) (Discussing the culture of poverty and the attributes associated with this "culture," as lifted from the preface to Oscar Lewis', *LA VIDA*). Levy also explores the intergenerational transmission of poverty; a theory which has currency in the 1990s and which relies heavily on the rhetoric of pop psychology, exhorting the welfare system for creating dependency. See also LEE RAINWATER & WILLIAM L. YANCY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* (1987) (discussing the work of Daniel Patrick Moynihan). I saw John Singleton's *BOYZ IN THE HOOD* (Columbia Pictures 1991), but I too should have been listening to rap music. See, e.g., Havelock Nelson, *Hip-Hop Offered Tip-Off on Urban Unrest*, BILLBOARD, May 23, 1992, at 22 ("[R]ap acts like Public Enemy, X-Clan, Too Short, 2Pac, N.W.A., Intelligent Hoodlum, Sister Souljah, Ice-T, and Ice Cube have been pairing the pain and frustrations of black life with bleak, bristling soundscapes that scream 'No justice, no peace!'—aural visions of burning buildings and smashed glass, boiling protests and 'smoked pork' (violence against the police).").

I tried to trace the phrase, "No Justice, No Peace" back to its origins. It was in use when Gavin Cato died in Crown Heights and was written on a sign at the sidewalk shrine to him. There are reports that the mob that killed Yenkel Rosenbaum shouted both "Kill the Jew" and "No Justice, No Peace." This disturbs me. There is no real understanding of oppression if the phrase is used so inappropriately; one oppressed group shouting racial epithets at another. See David Evanier, *Invisible Man: The Lynching of Yankel Rosenbaum*,

against a locker for calling someone a nigger.

Each of these responses to prejudice varies in terms of the violence involved and in the damage done to other human beings, but each was a violation of the law. I am a lawyer, charged with the responsibility of defending and upholding the rule of law. Yet I cannot, in good conscience, commend my son, or any member of those groups affected by the virulent message of the hate epidemic in our society, to the protection of the ethic of "civility." Civility means nothing more or less than unequal justice. Civility means you have no legal recourse. Civility is just another way of saying that justice in America is not only not color blind, it is color conscious in the worst possible way.¹²

NEW REPUBLIC, Oct. 14, 1991, at 21. If the reports of the behavior of the Hassidic community in Crown Heights are true; if their patrols assumed the role of the white police; if, as it is alleged, the Hassidic patrols interrogated "[B]lacks they deem[ed] out of place;" if "they detained a black youth merely because he was racing for the subway;" or beat another black youth "to a pulp" because he "allegedly grabbed a man's yarmulke," then the hostility and the use of the phrase makes more sense. Jonathan Rieder, *supra* at 30.

Before the Crown Heights incident, there was the incident in Bensonhurst where Yusef Hawkins was murdered. The banner "No Justice, No Peace" was carried by a crowd of demonstrators after Keith Modello was acquitted of the murder. It was part of the litany the crowd chanted after the trial. See Lorrin Anderson, *Cracks in the Mosaic*, NAT'L REV., June 25, 1990, at 36 (An absurd article on "black racism." The "racism" the writer decries is the hatred of whites. To call that hatred racism is a perversion of the meaning of the term.). Perhaps the phrase began here at Bensonhurst, an invention of activist Al Sharpton.

12. It is our consciousness of color that makes us pretend that color does not matter. Lawyers often play a significant role in challenging this assumption. The summation in a famous case, the prosecution of eleven Blacks for the murder of a white man serves as an example. The *Sweet* trial, as it came to be called, took place in Detroit in 1926. The prosecutor argued that race and color had nothing to do with the trial although the man killed had been part of a mob of white men outside the Sweet home. Clarence Darrow insisted that race had everything to do with it, and brought that point home over and over again in his summation. Darrow asked:

Suppose you were colored. Did any of you ever dream that you were colored? Did you ever wake up out of a nightmare when you dreamed that you were colored? Would you be willing to have my clients' skin? Why? Just because somebody is prejudiced! Imagine yourselves colored, gentlemen. Imagine yourselves back in the Sweet house on that fatal night.

Clarence Darrow, *Summation in the Sweet Case*, in *LAW AS LITERATURE* 346, 358 (Ephraim London ed., 1960). He returns to the theme again:

Here were eleven colored men, penned up in the house. Put yourselves in their place. Make yourself colored for a while. It won't hurt, you can wash it off. They can't, but you can; just make yourself black for a little while; long enough, gentlemen, to judge them and before any of you would want to be judged, you would want your juror to put himself in your place. That is all I ask in this case. They were black, they knew the history of the black.

Id. at 366. Once again, Darrow reiterates:

I should imagine that the only thing that two or three colored people talk of when they get together is race. I imagine that they can't rub color off their faces or rub it out of their minds. I imagine that it is with them always. I imagine that stories of lynching, the stories of murders, the stories of oppression are a topic of constant conversation. . . . Suppose you were black. Do you think you would forget it even in your dreams? Or would you have black dreams?

Id.

When we avoid the issue of color, it is because we know racism is dangerous and wrong. But ignoring the prejudice that exists in society is one way of insuring its continued vitality. For that reason, neutral principles are insidious and dangerous. When the doctrines or legal rules applied are "neutral," the result in a case seems legitimate and, even more importantly, it seems "principled," a characteristic which is highly valued in our

Sometime after his confrontation with this classmate, Chris began having nightmares. In one, he recognized a building as his school, but there were gurneys in the hallways. The patient on the nearest gurney had no head. A big schoolbus was parked outside the building and it had a sign across the front which read "DETENTION." Christopher told me that he was frightened. He was afraid that the bus was there to take him away.

I never taught my son to be afraid. When he experienced racism, he learned to be afraid. Racism is experienced as fear. The touch and the taste of it, manifested in the sweat on your palms, the dry feeling in your mouth, the apprehension that makes your stomach go sour, is fear.¹³ These sensations are grounded in a visceral understanding of the nature of racism. Racism is expressed through violence, or in its less extreme forms, in actions which are designed to humiliate.¹⁴ One escapes from

legal system. Most of us think that equal justice under the law means that those who have wealth and privilege are not immune from attack. In reality, inequality is embedded in the law, and the only result achieved by neutrality in the application of the law, is the preservation of that inequality. See, e.g., J. Skelly Wright, *The Courts Have Failed the Poor*, N.Y. TIMES MAG., Mar. 9, 1969, at 26. One of the themes which can be found in Critical Race Theory is the criticism of the idea of a 'colorblind' or neutral law. See, e.g., Anthony E. Cook, *The Temptation and Fall of Original Understanding*, 1990 DUKE L. J. 1163 (1990) (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1989)); Kimberle W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimization in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). For an interesting discussion of race as culture and the unwillingness of the courts to confront that issue see Neil Gotanda, *A Critique of Our Constitution is Color-Blind*, 44 STAN. L. REV. 1 (1991-92) and Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L. J. 365 (1991) (white aesthetics are involved in employer regulation of hair styles, and a decision which found this rule to be neutral overlooked the physical and cultural differences between men and women, Blacks and Whites, and the intersection of two forms of hegemony in the treatment of black women).

The myth of neutrality is particularly dangerous in areas of the law where the effects of racism are not immediately apparent. I teach partnership law and I have always been bothered by the absence of race in cases. I can find cases which reveal attitudes about class and gender, but I cannot find cases which mention race. I could speculate that courts would not classify a black person as a partner, but without a case in which a court discussed the race of the participants in a business, how could I prove it? Then I found *Butler v. State*, 111 S.W. 146 (Ct. Crim. App. 1908), a criminal case involving a charge of embezzlement. The defendant offered partnership as a defense. He lost this argument because neither the court nor the defendant himself was willing to say that a white man and a black man could be partners. I would never have known the reason for the holding in the case; I would never have understood the failure by the court to follow a line of precedent which would have dictated a different result, if not for a dissent which adopted verbatim the brief of defense counsel, James H. Hart, which discussed honestly and openly the effect of race and racism on everyone involved in the case, including the defendant. *Butler*, 111 S.W. at 148 (Davidson, P. J. dissenting).

13. The same physical sensations are described in Charles R. Lawrence, III, *A Dream: On Discovering the Significance of Fear*, 10 NOVA L. REV. 627 (1986). Professor Lawrence, through his response to a question by a character in his dream, discovers that the fear black people learned in slavery and have carried with them since emancipation is a fear of physical violence or deprivation, as well as a fear of humiliation, which he calls the fear of rejection. The fear of the oppressor (mythical and real), created through the act of oppression, is both rational and irrational.

14. Racism has as its basic premise the right of one people to dominate another—predicated on the assumption that the dominant group is superior to the subordinate group. So racism is always about putting black people in their place, teaching them not to be "uppity." This is often accomplished through humiliation. I remember how humiliated I felt, how incredibly angry I was, to pick up the *New York Times* and see black men in

the fear only to discover the meaning of anger.

A few years ago while I was collecting oral histories in Houston, an elderly black woman described her memories of Jim Crow to me: "Our parents never told us not to ride in the front of the bus. They didn't tell us to stay away from the water fountains that were marked 'White.' We just knew."¹⁵ Black children sensed the presence of danger; they knew enough to be afraid. She also described the "riot" by the black soldiers from Fort Logan in the summer of 1917.¹⁶ She remembered black soldiers marching through the streets of the Fourth Ward in disciplined fashion—in military formation. She told me that the riot began when a bus driver insisted that one of the soldiers sit in the back of the bus.¹⁷

their shorts with their hands up against a wall, their clothing apparently in a pile off to one side. The photographers and the news media had been invited to a raid of three Black Panther centers by the Philadelphia police. If the purpose had been to show that the Panthers were dangerous; if the search for concealed weapons was prudent, why did it all take place in the street and in full view of the cameras? Police Commissioner Frank Rizzo wanted to humiliate these men and he succeeded. Donald Janson, *Panthers Raided in Philadelphia*, N.Y. TIMES, 25 Sept. 1, 1970, at A1, A25.

When I try to make people understand what racism is all about, I often resort to a speech which was given by Ms. Edith King, President of the Coalition of 100 Black Women, in Houston, Texas at the opening of the Women of Courage Exhibit. Ms. King introduced Rosa Parks, the guest of honor at the opening. The photographs from the Exhibit can be found in ARTHUR AND ELIZABETH SCHLESSINGER LIBRARY ON THE HISTORY OF WOMEN IN AMERICA, RADCLIFFE COLLEGE, WOMEN OF COURAGE: A CATALOG OF AN EXHIBITION OF PHOTOGRAPHS, (Radcliffe College 1984) (based on the Black Women Oral History Project sponsored by the Arthur and Elizabeth Schlessinger Library on the History of Women in America, Radcliffe College. The exhibit was of photographs of Judith Sedwick). Ms. King had this to say about Mrs. Rosa Parks:

Perhaps now her act seems a small thing. But to those of us who rode in the back of the bus, who stood silently while others sat; to those of us who remember the indignation of no public restrooms and other facilities; to those of us who remember carrying just a little fear with us always; for all the missed carnivals, plays, concerts and trips to the library and all the other small things that demeaned us daily—this act was and is the height of courage. For Mrs. Rosa Parks quietly did what each of us wished we had the courage to do.

Edith King, Sept. 5, 1985, given at Julia Ideson Public Library, Houston, Texas. (on file with author).

Humiliation was institutionalized in the South. However, the absence of segregation in the North did not mean that we who were raised in the North were free from the effects of racism or the techniques of racists.

15. In connection with the Women of Courage Project, I interviewed several black women and prepared their biographies for the opening night ceremonies honoring their contributions to the community. Among them was Mrs. Martha Countee White, the granddaughter of Jack Yates, founder of the Antioch Baptist Church and community leader before and after Emancipation. I cannot be sure that Ms. White told me this story; it could have been any of the number of women or men I interviewed for the project.

16. There are many parallels which can be drawn between the riots in Los Angeles and the riots in Houston. See generally ROBERT V. HAYNES, A NIGHT OF VIOLENCE: THE HOUSTON RIOT OF 1917 (1976); JOHN M. LINDLEY, A SOLDIER IS ALSO A CITIZEN: THE CONTROVERSY OVER MILITARY JUSTICE 1917-1920 (1990) (an account of the effect of the court martial which followed on military justice). *Camp Logan* is also a play by Celeste Bedford Walker which has been presented at Wellesley College and at the Terrace Theatre in Washington, D.C. See Matthew Gilbert, *Camp Logan Filled with Ensemble Power*, THE BOSTON GLOBE, Oct. 9, 1991, at 75 (reviewing the production); Pamela Sommers, *The Character of Racism*, WASH. POST, June 21, 1991, at B2. After the "riot" in Houston, 156 black soldiers were tried for mutiny, murder and riot. JOHN M. LINDLEY, *supra* at 8.

17. See HAYNES, *supra* note 16, at 90-114; LINDLEY, *supra* note 16, at 13-15 (describing the events of the day of the riot). Most Whites and Blacks would be surprised to learn that long before the bus boycott in Montgomery, Alabama, Blacks had engaged in boycotts to

History reports other reasons for the riot. Some say that it began when a black soldier was beaten by a white police officer.¹⁸

It does not really matter to me which of the two incidents precipitated the incident. What does matter is the reaction of the young black men to the injustice of Jim Crow; and the reaction of the white community to the rebellion of those young black men.¹⁹ Seventeen whites were killed, four of them police officers. Twenty-three young black men were executed, thirteen of them hung and buried in secret, unmarked graves and many more were imprisoned.²⁰

protest the segregated seating on street cars. See HAYNES, *supra* note 16, at 28 & n.43 (citing August Meier & Elliot Rudwick, *The Boycott Movement Against Jim Crow Street Cars in the South, 1900-1906*, J. AM. HISTORY, Mar. 1969, LX & 756-75).

18. See generally HAYNES, *supra* note 16, at 30-31 (discussing the use of force by police and the disparate treatment accorded black citizens in a moral crusade designed to rid Houston of prostitutes and bootleggers). The account which appears in the official reports issued after the investigation of the events that day describe not one, but two occasions when two Houston policemen beat, and then arrested, black soldiers. The first was an unarmed soldier, Private Edwards. The police later detained Corporal Baltimore. A great many of the police apparently made it a practice to call the black soldiers "nigger." LINDLEY, *supra* note 16, at 13. The reports were unanimous in assigning much blame to the police for what happened that day. See *id.* at 7-36, discussing the three reports on the Houston riots: COL. GEORGE O. CRESS, INVESTIGATION OF THE TROUBLE AT HOUSTON, TEXAS BETWEEN THIRD BATTALION, 24TH INFANTRY AND CITIZENS OF HOUSTON, AUG. 23, 1917 (1917) (available at Old Military Records Division, Records of United States Army Continental Commands, 1821-1920, Record Group 393, File 370.61, National Archives Building, Washington, D.C.); NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE REPORT OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN CRISIS 15 (Nov. 15, 1917); MAJ. KNEELAND S. SNOW, REPORT ON THE CIRCUMSTANCES ATTENDING THE MUTINY (1917).

Sixty years later, in 1977, the Houston police murdered a Mexican-American, Joe Campos Torres. In the words of one of the police, they beat him up and threw him into Buffalo Bayou "to see if the wetback could swim." Bill Curry, *4 Ex-Policemen Indicted in Death of Tex. Prisoner*, WASH. POST, Oct. 20, 1977, at A13. When the state trial resulted in a one-year sentence and a \$2000 fine for each of the defendants, the Carter administration reversed a ban on federal prosecutions for civil rights violations on which state action had been taken, a policy that had existed from the time of the Eisenhower Administration. *Id.* The federal prosecutors did not fare much better. The defendants in the federal trial were convicted, but Judge Ross Sterling gave them a ten-year suspended sentence for depriving Torres of his civil rights and a one-year jail term for a separate misdemeanor. Jerrold K. Footlick, *Houston Justice*, NEWSWEEK, Apr. 17, 1978, at 122. In 1985, the predominantly white police force in Houston vowed to embarrass and humiliate Police Chief Lee Brown, who is black, at a meeting of the International Association of Police Chiefs in Houston. Wayne King, *Police Union Vows to "Humiliate" Houston's Chief at World Meeting*, N.Y. TIMES, Aug. 6, 1985, at A13.

19. Six months after the riot, Ted Koppel interviewed the people who live in South Central Los Angeles. Once again, I was surprised at the level of political awareness among the general population, young and old, women and men. This awareness manifested itself in young men who characterized the events of April 26, 1992, as a rebellion, not a riot. All agreed that they would like to rebuild their community, but they could not rebuild without resources; they could not survive without jobs; and the inaction on the part of the government (which is a stand-in for the white majority) would result, ultimately, in even more violence. *Nightline* (ABC television broadcast, Oct. 21, 1992). See also *After the Riots: The Search for Answers*; Tucker Says the Status Quo Must Change, L.A. TIMES, May 8, 1992, at A6 (Assemblyman from Los Angeles issues prediction that if the status quo remained the same, "we'll burn this state down.").

20. The army separated the soldiers who were to be tried into three groups. The first group consisted of 63 men. Thirteen were tried and hung; only five were acquitted. Forty-

Things have not changed much since 1917.²¹ A fear of black men still dwells in the collective unconscious of America. The verdict in the Rodney King case legitimized that fear. The videotape of the violent attack on a white truck driver will, no doubt, lead to the conviction of the young gang members who are alleged to have participated in that attack.²² The swiftness with which justice will be meted out in their case is also an expression of that fear. In a way, this fear, the very vehemence of the condemnation of the riots, is an admission that young black men have reason to be angry. The condemnation is a warning that rebellion will not be tolerated.

My son was willing to take responsibility for defending his dignity and the dignity of the only other black student in his class. He knew without my telling him, that his actions, which we both considered justified, would put him at risk of punishment. The decision in the Rodney King case, and the events that followed, only confirmed what we both knew: penalties are exacted for acts of defiance, when pride makes submission impossible. The soldiers from Camp Logan were hung, and Rodney King was beaten because he refused to submit. I would wager that the gang members will receive harsh prison sentences. In his dream, Chris was afraid of the punishment for the crime that he felt he committed. After all, someone lay headless and mute. Who but Christopher could be responsible for this? But what would his dream have been if he had done otherwise; if he stood by without defending himself or others from racist attacks?

Last summer, a friend told me about a young black child, a ten year-old, who struggled with his own passivity in a situation where a black classmate was beaten by white boys in their class. The image of all of

one received life sentences, and four received shorter terms of imprisonment. LINDLEY, *supra* note 16, at 18.

Eventually, the life sentences were commuted after public outcry over the secrecy surrounding the first court martial and the lack of appeal from the sentences. A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 1910-1932 332 (Herbert Aptheker, ed., 1990). The NAACP worked to obtain the parole of those men who were sentenced to prison; and finally in 1938, the last of them was released. One account of the struggle of the NAACP on their behalf describes the events of September 28, 1921 when James Weldon Johnson, then Secretary of the NAACP, had an audience with President Harding and presented a petition signed by 50,000 persons asking for the pardon of 61 soldiers confined in Levinworth as a result of the 1917 riot. *Id.* at 334.

21. See, Nathaniel Jones, *Introduction*, 70 DENV. U. L. REV. 195 (1993).

22. *The Messenger*, a monthly magazine published by A. Philip Randolph and Chandler Owen published an editorial in January, 1918 concerning the administration of justice in the case of the black soldiers from Camp Logan. APTHEKER, *supra* note 20, at 195. The editorial in *The Messenger* compared the treatment received by white soldiers who shot and wounded Blacks in East St. Louis to the treatment given the men of the 24th Regiment in Houston. In the former case, no soldiers were apprehended or tried; in the latter, thirteen of the black soldiers were tried, denied the right of appeal, executed in secret and buried in unmarked graves. *Id.* at 196-97.

It seems that vengeance and justice are the right of only the white majority. We shall see whether justice tempers the punishment in the case of the young black men in Los Angeles, or whether, in the words of James Weldon Johnson, their trials bear the "aspect of visitation upon their color rather than upon their crime." James Weldon Johnson, Speech Delivered to President Harding (1921), reprinted in APTHEKER, *supra* note 20, at 334. The occasion for the speech is discussed *supra* note 20.

these young white boys in a circle around a black youngster on the ground, kicking him and yelling racial epithets, made my blood run cold. I found it incredibly sad that a young black boy could find himself standing on the periphery, witnessing a brutal attack, unsure of how he should respond. There was a punishment imposed in that case after the parents of the black child called the police and had them investigate the incident. The school suspended two or three of the white boys who were thought to have goaded the mob of boys into violence. It also suspended the black student who had been beaten. It all began, you see, because he pushed another boy on the playground.²³

Both Chris, who chose to act, and his young friend, who chose not to act, understood intuitively that defending who they were would put them at risk. The risk exists because racism distorts the perception of right and wrong; it realigns responsibility and blame, shifting both from those who hate to those who are hated.²⁴ In the Rodney King case, specious arguments about control shifted responsibility from the mob that attacked the man to the man who was attacked.²⁵ Actually, the shift was

23. I heard of the incident from a child and from several parents whose children attended an elementary school in Rolling Hills, California, a suburb of Los Angeles. In an unrelated incident that same month, the older child in this same family described a flier shown to him by a "friend" which compared the head of an ape to the head of a black man and in pseudo-scientific form presented statistics which proved the biological connection between the two.

24. Defense attorney John Barnett explained that the strategy in the Rodney King case was to make the jury "feel" something, to "put the jury in the shoes of the police officer and make them feel what they felt, what it's like to be an officer at 11:45 p.m. on Foothill Avenue." John Riley, *Inside the King Case, Part I: What the Jury Heard That the Public Didn't*, *Newsday*, May 13, 1992, at 17. For another startling example of misplaced, but natural, empathy, see *THE TIMES OF HARVEY MILK* (Pacific Arts Video 1986) (copy on file with author). A voice-over describes the reaction of the jury that watched the videotaped confession of the man who killed Mayor George Moscone and Harvey Milk, a gay rights activist and city official. The jury cried as Dan White broke down and explained that he had been under pressure. He killed Harvey Milk after killing the Mayor because Harvey Milk "smirked" when Dan White showed up at his office.

25. See Kimberle Crenshaw & Gary Peller, *Reel Time/Real Justice*, 70 *DENV. U. L. REV.* 283 (1993) (discussing disaggregated narrative). It is hard to say which was more pernicious, the strong pull of the identity between the defendant and the jury, or willingness to assign fault to the victim. The defense emphasized the fact that Rodney King rose after the first attack and lunged toward one of the police officers. A juror on *The Today Show* (NBC television broadcast, Apr. 31, 1992) stated that Rodney King was "directing the action." According to the juror, "even during the handcuffing, he was still fighting. During the process he was laughing and uttering sounds. No, he was in complete control." Lee A. Daniels, *Riots in Los Angeles: The Jury; Some Identified as Jurors Aren't in Accord on TV*, *N.Y. TIMES*, May 1, 1992, at A23. Retta Kossow, a juror who was interviewed on *CBS News* (CBS television broadcast, Apr. 30, 1992) repeated that argument: "I am thoroughly convinced, as were the others, I believe, that Mr. King was in full control of the whole situation at all times. He was not writhing in pain. He was moving to get away from the officers and he gave every indication he was on PCP." Nina Bernstein, *Bitter Dispute in Jury Room; How 12 Ordinary Citizens Met For 7 Days to Produce the Verdict that Shook L.A.*, *Newsday*, May 14, 1992, at 5. Her husband added in another interview that his wife felt sorry for Mr. King, "[b]ut how about the police officers? Their lives were completely ruined because Mr. King wanted to go out and have a good time." *Id.* Despite Ms. Kossow's protestations, not all the jurors agreed. See, e.g., Bernstein, *supra* (report of juror who called the Donahue show sobbing).

The control theory offered by the defense was about as preposterous as the theory used by the defense in the Milk case: Dan White had been suffering from a depression brought on by eating junk food. In the King case, the defense sought to make the victim

more subtle than that. It was a shift to the idea of what Rodney King represents, the potential for violence which lies dormant in all who are oppressed. Do not expect symmetry in the law where gang members are concerned. There will be no shift of guilt from the mob we witnessed attacking a white victim to the idea that white victims represented, the group that discriminates against Blacks and refused to convict even the police officer who rained fifty-six blows on Rodney King.²⁶

The morning after the riots began, there was a picture of a black minister on the morning news.²⁷ It showed him as the verdict was announced. A single tear rolled down his face. He epitomized the disillusionment that Blacks feel. The Civil Rights Movement and the legal strategies devised by Charles Hamilton Houston,²⁸ pursued by Justice Thurgood Marshall and Judge Constance Baker Motley, and legal victories like *Brown v. Board of Educ. of Topeka*²⁹ and the Civil Rights Act of 1964,³⁰ led us to believe that the law could be the instrument of reform; a means of achieving real equality, or at least freedom from discrimination. Now, we know better. We hear the voice of racism in the decisions of a Supreme Court that refuse to provide a remedy when defendants say "We are not racist," even when their conduct can reasonably be

responsible for what happened to him. In the Milk case, the defense succeeded in convincing the jury that sugar was responsible for what happened. Sugar was the official culprit, but Dan White's confession blamed Harvey Milk for his own death. Perhaps they were persuaded that Harvey Milk was the source of Dan White's fall from political grace and that he was so arrogant that he literally asked (with that now infamous smirk) for his own death.

The strategy employed so successfully in both cases is part of a larger phenomenon, which is the criticism of the "victim" mentality or ideology. See, e.g., SHELBY STEELE, *CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* (1990). Professor Steele seems to have the corner on the market when it comes to articles on race that appear in *Harpers Magazine*. His most recent effort, written after the riots in Los Angeles, is a further attack on what he calls the orthodoxy of the diversity movement. He dismisses those who continue to fight injustice in this society as the work of those who are interested in self-aggrandizement; as "the narcissism of victims," power purchased at the "exorbitant price of continued victimhood." Shelby Steele, *The New Sovereignty: Grievance Groups Have Become Nations Unto Themselves*, *HARPERS*, July 1992, at 47-54. See generally the discussion of the use of the "rhetoric of poverty," the persistence over time of the practice of blaming the victims of poverty for their condition, particularly the use of this rhetoric in Supreme Court decisions in Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 *GEO. L.J.* 1499 (1991).

26. I think it was probably a Freudian slip by the black prosecutor when he described the jurors as people who "believe there is a thin blue line separating law-abiding citizens from the jungle—the criminal element." Nina Bernstein, *supra* note 25, at 31. Although the District Attorney did not call the jurors racist, his metaphor certainly calls up the language of racism: the classification of Blacks as animals, one step removed from their simian relatives. Perhaps he was still thinking about Officer Powell's description of a domestic dispute as "something right out of Gorillas in the Mist." Riley, *supra* note 24, at 17.

27. *The Today Show* (NBC television broadcast, Apr. 29, 1992).

28. Judge Leon Higginbotham refers to Charles Hamilton Houston as "the chief engineer and the first major architect on the twentieth century civil rights legal scene." Judge A. Leon Higginbotham, Jr., *Foreword*, in GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* at XV (1983). Judge Higginbotham turns the jungle metaphor on its head when he refers to the "jungle of racism tolerated by the American Legal Process." *Id.*

29. 347 U.S. 483 (1954).

30. 42 U.S.C.A. § 2000e (1981 & Supp. 1992).

viewed as racist;³¹ which is philosophically opposed to remedial legislation based on race;³² whose neutrality protects those who threaten to

31. See generally *TRIBE*, *supra* note 6, §§ 16-20 (discussing the discriminatory purpose requirement). Professor Tribe has entitled one section "The Problem of Discriminatory Purpose: When Reservations About Remedies Masquerade as Questions About the Existence of Constitutional Violations." *Id.* at 1502. While I would not presume to dispute the point with Professor Tribe, I have to confess that I would not be so charitable in ascribing motive. When now Chief Justice Rehnquist first described his judicial philosophy as "majoritarian," I read that as a statement of his political philosophy; a description of his allegiance and his commitment to hold the line in a political struggle. John A. Jenkins, *The Partisan*, N.Y. TIMES, Mar. 3, 1986, § 6 (magazine), at 28, 32.

The rejection of a "disparate impact" test for one which looks for fault on the part of the state, the "perpetrator perspective," is another example of the aversion to the idea of collective guilt. See *TRIBE*, *supra* note 6, at 1509 (citing Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Laws: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-54 (1978)). See also the discussion of collective guilt *infra* note 50 and accompanying text.

The Supreme Court has interpreted the Equal Protection Clause so that it is a deterrent not to racism, but to the overt expression of that racism. In a society where people have learned that it is important to deny their racism it is virtually impossible to prove discriminatory intent.

Although the Court has held that discriminatory intent can be shown by circumstantial evidence, that burden is very difficult to meet. See *Crenshaw & Peller*, *supra* note 25. Compare *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977) (no discriminatory purpose in zoning ordinance) with *Hunter v. Underwood*, 471 U.S. 222 (1985) (provision in Alabama Constitution which disenfranchised those convicted of crimes of moral turpitude was unconstitutional). As my colleague Professor Martin A. Schwartz pointed out, if the Court really wanted to find discriminatory intent based on circumstantial evidence, it could have done so in death penalty cases. See Susan Waite Crump, *Lockhart v. McCree: The "Biased but Unbiased Juror," What Are the States' Legitimate Interests*, 65 DENV. U. L. REV. 1 (1988); Regina M. Harris, Note, *McCleskey v. Kemp: The Shadow of Racism on the Capital Sentencing Process*, 8 N. ILL. U. L. REV. 173 (1987); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty*, 43 FLA. L. REV. 1 (1991); Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing*, 18 N.Y.U. REV. L. & SOC. CHANGE 777 (1990-91); Mary Elizabeth Holland, Note, *McCleskey v. Kemp: Racism and the Death Penalty*, 20 CONN. L. REV. 1029 (1988);

The more recent cases distinguish between private and public discrimination; which relieves the state of responsibility for segregation when it reflects the "natural" preference of private individuals. See *Freeman v. Pitts*, 112 S. Ct. 1430 (1992). Racism becomes a part of our human condition, a cultural artifact which is indistinguishable from other less harmful preferences—for example, the preference of living in a brownstone or rowhouse or co-op, or in a Georgian, ranch style or tudor home, or living in a neighborhood with Blacks or without Blacks. Racism is something which we cannot remedy as a society because the state cannot be blamed for the preferences of individuals. The state is not a person, it is a collection of institutions acting through people for the benefit of people, it is the means of expressing and implementing our collective will. Properly viewed, it should be seen as an appropriate resting place for our collective guilt. The burden then falls on the state, as the representative of our entire community to discourage prejudice and to act affirmatively to remedy the harm which has been caused in the aggregate by individual actions.

32. The use of the shibboleth "Our Constitution is Color Blind," has been used to attack minority set-aside programs and other affirmative action programs. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (limiting the scope of federal civil rights legislation, the Court found no remedy under § 1981 for discrimination which was alleged to have occurred after the contract was formed); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (minority set-aside program for Richmond, Virginia was unconstitutional).

There may be a different standard applied when Congress specifically endorses a policy of affirmative action. See *Metromedia Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990) (Congress responded to an executive decision to curtail the affirmative action policy of the FCC by adding a provision to an appropriation bill which prevented the change in policy). For a discussion of the ideological divide between the majority and the dissent see Patricia

harm us;³³ and that has a Black man who has so identified with the oppressor that he would allow a white prison guard to beat someone who is the image of himself.³⁴ The minister's tears and mine were a measure of the depth of our mutual despair; our grief when we both realized, he, the layman and me, the lawyer, that the law has no power against racism.

I cried when I heard the decision in the Rodney King case. I was angry at the perversion of the rule of law; at the immoral shifting of responsibility and realignment of right and wrong. The jury was asked to determine whether the police used "excessive force."³⁵ Ultimately, that determination involved some assessment of whether the police behaved reasonably.³⁶ The "reasonable person" test is an article of faith among lawyers and lay people. "Reasonableness" is an idea that is at

Williams, Comment, *Metro Broadcasting, Inc. v. FCC: Regrouping the Singular Times*, 104 HARV. L. REV. 525 (1990).

33. See, e.g., *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (invalidating ordinance which criminalized behavior that threatened minorities).

34. *Hudson v. McMillan*, 112 S. Ct. 995 (1992). See Linda Greenhouse, *High Court Defines New Limit on Force By a Prison Guard*, N.Y. TIMES, Feb. 26, 1992, at A1; Ruth Marcus, *High Court Extends Curb Against Beating Prisoners; Ruling Represents a Rare Victory for Inmates*, WASH. POST, Feb. 26, 1992, at A4; Ira Mickenberg, *Court Clarifies Indefinite Issues In Criminal Law Cases*, NAT'L L.J., Aug. 31, 1992, at S6 (discussing the incongruity between Thomas' dissent in *Hudson v. McMillan*, 112 S. Ct. 995 (1992) (Thomas, J., dissenting) and his testimony at confirmation hearings at which he noted his identification with the prisoners who passed by his office in the court of appeals); Martin A. Schwartz, *The Prisoner Beating Case*, N.Y. L.J., Apr. 21, 1992, at 3. See also Dale E. Butler, Comment, *Cruel and Unusual Punishment Takes One Step Forward, Two Steps Back*, 70 DENV. U. L. REV. 393 (1993).

35. The jury instructions in *People v. Powell* are seventeen pages long. See *People v. Powell*, *Jury Instructions*, available in LEXIS, California Library, L.A.P.D. File. The four counts on which the defendants were tried were explained in some detail. Count I charged Officers Powell, Wind and Briseno (who argued that his use of force was in defense of another, namely, Rodney King) with violation of California Penal Code § 245(A)(1). CAL. CODE § 245(a)(1) (West 1988 & Supp 1993) (Assault with deadly weapon or force likely to produce great bodily injury; punishment). Count II alleged a violation of California Penal Code § 149, CAL. CODE § 149 (West 1988) (Officer unnecessarily assaulting or beating any person) making it unlawful for any public officer who, under cover of authority and without lawful necessity, to assault or beat any person. Count III charged Powell with filing a false police report. CAL. CODE § 118.1 (West Supp. 1993) (Peace officer's false report). Count IV charged Officer Stacey C. Koon with filing a false police report. CAL. CODE § 118.1. Count V charged Officer Koon with being an accessory in the commission of a felony in violation of California Penal Code § 32. CAL. CODE § 32 (West 1988) (Accessories defined). The indictment is available in LEXIS, Cal. Library, LAPD file.

36. With respect Count II (officer unnecessarily assaulting or beating another person), the judge stated:

In making an arrest the officer may subject the person being arrested to such restraint as is reasonable for the arrest and detention. A peace officer who is making an arrest may use reasonable force to make such arrest or to prevent escape or to overcome resistance.

Where a peace officer is making an arrest, the person being arrested—and the person being arrested has knowledge, or by the exercise of reasonable care, should have knowledge that he is being arrested by a peace officer and such peace officer is making an arrest, it is the duty of the person to refrain from using force or other means to resist such arrest unless unreasonable or excessive force is being used to make the arrest.

However, a peace officer is not permitted to use unreasonable or excessive force in making an otherwise lawful arrest. If an officer does use unreasonable or

the heart of our legal system.³⁷ It is central to the belief in the morality of the law itself.³⁸ The verdict is immoral because racism has been legit-

excessive force in making or attempting to make an arrest, the person being arrested may use reasonable force to protect himself against such excessive force.

As I have stated, a peace officer who is making a lawful arrest may use reasonable force to make such arrest or to prevent escape or to overcome resistance.

It is lawful for a peace officer to use force in the arrest if a reasonable peace officer in the same or similar circumstances would believe that such force is necessary to make the arrest or to prevent escape or to overcome resistance. In doing so, such peace officer may use that force and means that a reasonable peace officer, in the same or similar circumstances, would believe to be necessary to make such arrest or to prevent escape or to overcome resistance.

The right of a peace officer to use reasonable force exists only so long as it would appear to a reasonable peace officer, in the same or similar circumstances, that that force is necessary to make such arrest or to prevent escape or to overcome resistance.

When that force would no longer appear to a reasonable peace officer, in the same or similar circumstances, to be necessary, the right to use reasonable force no longer exists and the use of such force is not reasonable. The use of force that is not reasonable is unlawful and without lawful necessity.

The people have the burden to prove that the force used was not lawful and without lawful necessity. If you have a reasonable doubt that the use of force was unlawful and without lawful necessity, you must find the defendant not guilty.

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer under the same or similar circumstances. The test of reasonableness is not capable of precise definition or mechanical application. It is — its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others and whether he is actively resisting or attempting to evade arrest by flight. The question is whether the totality of the circumstances justifies a particular sort of force.

People v. Powell, *Jury Instructions*, *supra* note 35.

37. The notion of reasonableness, and its use as a standard, cuts across the legal boundary lines. In contract law, we interpret behavior, including words and expressions, to determine whether a reasonable person would perceive a communication as an offer: "[T]he 'objective' test affords the courts an opportunity to control or regulate individual exchange behavior through the use of that great 'collectivist,' the 'reasonable' person." EDWARD J. MURPHY & RICHARD E. SPEIDEL, *STUDIES IN CONTRACT LAW* 261 (4th ed. 1991). The Uniform Commercial Code fills the gaps in contracts with reasonable terms: a reasonable price, § 2-305; delivery is due within a reasonable time, § 2-309; and the parties, if they are merchants, have a duty to act with commercial reasonableness, § 2-104, cmt. 2. AMERICAN LAW INST., *NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, SELECTED COMMERCIAL STATUTES* (12th ed. 1991). Reasonableness is also a benchmark for corporate directors; the officer or director has to behave in a way which he or she "reasonably" believes to be in the best interests of the corporation and make the appropriate inquiries in any situation which would alert a "reasonable" director. AMERICAN LAW INST., *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, PROPOSED FINAL DRAFT* § 4.01(a) (1992). We have seen how often reasonableness was invoked in the *People v. Powell* jury instructions on only one of the many counts. See *People v. Powell*, *Jury Instructions*, *supra* note 35. And, of course, the judge did instruct the jury on the standard of proof, beyond a reasonable doubt. *Id.*

38. See generally LON FULLER, *THE MORALITY OF LAW* (revised ed. 1969) (discussing "[t]he morality that makes law possible"). He also argues that the law must be clear. *Id.* at 63. I am sure that the reasonable person standard would satisfy his requirements, because it is, to use his own words, one of a species of "common sense standards of judgment that have grown up in the ordinary life outside legislative halls." *Id.* at 64. This great collectivist, the reasonable person, is the standard which dispenses with difference and assumes assimilation into the dominant culture. See CALABRESI, *supra* note 2, at 28 (discussing the reasonable person standard and the effect on diversity). It is unfair and dishonest to ask people to abide by your rules and then to change the rules because they do not work to your advantage. I discussed this problem of manipulable standards in an earlier article. See Deborah Post, *Reflections on Identity, Diversity and Morality*, 6 *BERKELEY WOMEN'S L.J.* 136

imated as reasonable, rational human behavior.

I have read about the protests of the jurors who are hurt by the allegations that they are racist. They claim that the evidence was not so clear cut. The defense offered an explanation of the beating which was credible: the police were justified in continuing to use force as long as Rodney King resisted. His shouts of obscenities, his continued attempts to stand, his struggle, proved that he was "in control of the action."³⁹ I have trouble explaining this reasoning to my son. It does not accord with my understanding of American values: Americans believe that human beings are rational and should behave accordingly; Americans have great faith in science and in empirical evidence; and Americans believe in the efficacy of the law in discerning the truth.

The reasonable person is the connecting tissue that links these visions. It is one way in which we translate our aspirations for humankind into a system of ethics. This objective standard, I learned as a law student, is a moral yardstick by which we measure our fellow citizens. The reasonable person is a standard which determines the scope of our responsibilities to one another. You don't have to be a lawyer to understand the idea that we are responsible for what we know and what we should know. Purposeful ignorance is no defense. Even Christopher knows the futility of the "I didn't mean it" defense. Invariably that defense elicits the "You should have known better" judgment.

The jurors could have asked whether the police officers should have known better. The answer would have been that no reasonable person in the position of those police officers could have believed that Rodney King was in control of the situation. For that matter, no reasonable person in the position of those jurors could have exonerated the police after viewing that videotape. No rational human being could have disregarded the evidence that jury had before it. Some new and unusual meaning must have been assigned to the images which were captured on that videotape.⁴⁰

(1990-91). Fuller indicated that the most difficult questions arise when the law involves questions of interpretation. He was discussing the interpretation of the law by courts, but what he said is equally true when promotion and tenure committees in legal institutions interpret what "quality" means, or when a jury decides what is "reasonable." When one interprets behavior or conduct in a way that is contrary to the ordinary understanding of that behavior, it is a lie. Call that cheating, or a shell game. It is fraud and it is immoral. Perhaps I should offer you Fuller's version which is more elegant and certainly more polite. He stated that there must be congruence between official action and declared rule, and noted that one of the dangers to that congruence was the effect of prejudice. FULLER, *supra*, at 81.

39. See Bernstein, *supra* note 25 (discussing the jurors' comments after the verdict).

40. The jury received the following instructions with respect to the expert testimony which was offered in the case:

[I]n rendering an opinion as to the use of force in this case, one or more expert witnesses expressed an opinion on what physical acts are shown on exhibit 2, the so called Holliday videotape. Such experts have no more skill than a lay person in viewing the videotape and determining what it shows in this regard. To the extent that you find that the videotape is important to you in your deliberations and decision in this case, you are the sole judges of what physical acts are shown on this tape.

Jury Instructions, *supra* note 35. I would say that the judge went pretty far in telling the jury

In fact, the interpretation the defense offered and the jury embraced was based on a novel use of the term "reasonable." It was a standard of reasonableness that takes race into account unilaterally. The standard of reasonableness they employed was one which does not acknowledge the reasonableness of the attempt by a black man to escape the police when they give chase,⁴¹ but does acknowledge the justifiability of the fear that white cops have of black men. The reasonableness of the police was measured by something which approaches a subjective standard; one which attempts to understand and place the actions of the police in context and to understand the emotions they experienced.⁴² It is a standard of reasonableness that ignores the relative positions of the two parties, or the superior force, numerical and technological, that the police enjoyed.⁴³ It is a standard which presents the police as victims.

to take the expert testimony with a grain of salt. To the extent that the jury (or the eight people who dominated the jury) interpreted the pictures they saw in a new way, I would conclude that they wanted to see what was described to them. This is not a case where a group of people was manipulated by a narrative which grabbed their emotions; a technique which can be used effectively to create empathy and communicate information about a reality which is unknown to the person who hears the narrative. This is an example of people seizing on an explanation which allowed them to reach the result they wanted. *But see* Crenshaw & Peller, *supra* note 25.

41. See Culp, *supra* note 2 (discussing how to address the "race question" in the courtroom and the "rules of engagement").

42. See a discussion of the defense strategy *supra* note 24. Most recently, a call was made for sympathy and understanding in another case of police misconduct. Mr. Rudolph Giuliani, former and future mayoral candidate in the City of New York, accused Mayor Dinkins of a double standard when he did not forgive and forget the rampage of police officers in front of City Hall, police officers who carried signs which referred to Mayor David Dinkins as a "washroom attendant." Again, this is racism as degradation and humiliation. See George James, *Police Dept. Report Assails Officers in New York Rally: Disciplining of 42 Is Sought for 'Unruly' Protest*, N.Y. TIMES, Sept. 29, 1992, at A1. Mr. Giuliani contrasted Mayor Dinkins' behavior towards the police officers as unwarranted in light of his lack of "zealousness" with regard to "rioting, looting and murder". Some say it was Mr. Giuliani's intemperate remarks which provoked the lawless behavior by the police. As described in one report, Mr. Giuliani "listed a number of Dinkin's policies and after each one, used a profanity to dismiss them." Todd S. Purdum, *Slurs from Police Are Not New to Dinkins*, N.Y. TIMES, Sept. 19, 1992, at 22. Others attribute the "washroom attendant" signs to Bob Grant, a talk show host whose venomous attacks on Blacks and gays is legendary. See, e.g., Paul Vitello, *What Did He Do To Deserve This? Just Ask Him, Pal*, NEWSDAY, May 24, 1992, at 6 (one columnist's comments on the Bob Grant show, sentiments which I share).

43. Police do not need sympathy. They have power over people's lives. The power of the police cannot be overstated. Certainly minorities and the mayors of Los Angeles and New York City, in particular, have learned that lesson from former Los Angeles Police Chief Daryl F. Gates and the head of the Police Benevolent Association, Phil Caruso. It is akin to having the power of the armed forces in the hands of someone hostile to the chief executive. Two solutions have been suggested. One is the recruitment of more of the groups who have often been the victims of police brutality, Blacks or gays for instance. The other is the establishment of civilian review boards. Neither avenue is a panacea. See, e.g., Lindsey Gruson, *Syracuse Grapples with Debate Over Civilian Review of Police*, N.Y. TIMES, Aug. 3, 1992, at B1 (information about the renewed popularity of the civilian review board, an idea that has been in existence for more than a generation).

The sympathy for police and the affinity of the residents of Simi Valley was discussed extensively after the verdict. The sympathy is rooted in the perception that the police have a dangerous job, an idea that is communicated daily in one or more of the endless list of police shows on prime-time television: *Cops* (Fox television broadcast), *Law and Order* (NBC television broadcast), *Commish* (ABC television broadcast) and *Secret Service* (NBC television broadcast). The list seems endless. I guess we could even count the seemingly

But the police were not the victims in this case.

The approach to reasonableness used by the defense is one which should only be used to understand the harm which is experienced by a victim. It serves an important function in creating empathy, an understanding of the harm that is experienced by victims. The defense took a test which was relevant to the harm experienced by Rodney King, and turned it into something which could be used to exonerate the police officers.⁴⁴

Race should have been considered in this case. The jury should have considered the fact that we live in a society in which racism is pervasive; where there are myths and stereotypes which perpetuate racism; where symbols and symbolic action announce the superiority of one group and the inferiority of another as a claim of power and a demand for submission. The "control" theory that the defense offered and the jury accepted is as much a legalization of racial hatred as the Jim Crow laws of the prior generation. It commands black men to submit.⁴⁵ All my son will have to do to avoid a beating like the one Rodney King received is to remain prostrate at the feet of any white man with a badge of authority who stuns him with an electric prod and then beats him with

innocuous shows, like *Picket Fences* (CBS television broadcast) which has police officers as its main protagonists, although the show attempts to introduce issues of prejudice and individual rights as something more than an inconvenience that prevents the police from locking up heinous criminals.

44. There is a great deal of confusion about the need for empathy and understanding. Most of it arises from the unwillingness to use terms like oppressor or oppressed. It makes us seem too Marxist, too far to the left. The fact is that majority group members may be victims of particular crimes, but they are not victims of systematic discrimination or disadvantage. A police officer's job may be dangerous. A black, homosexual or woman's life is dangerous, not because of what they have chosen to do for a living, but because of who they are.

I have a very good, and extremely well intentioned friend, Louise Harmon, whose confusion is illustrative of the problem. The other day she asked me whether I thought she had been insensitive in a class when she described the market targeted by a developer for Sun Valley, a retirement community. "What did you say?" I asked. She said she remarked on the ingenuity of those who brought "elderly, arthritic, sinus suffering, middle class white people into the middle of the desert." I was confused. Was it the reference to age that was insensitive, or the fact that she described the old people as arthritic and sinus suffering that concerned her? No, she was concerned about the fact that she used the term "white" to describe them. My immediate response was, "When has the term white been used to someone's disadvantage?" She continued to explain what it was that bothered her about the class: Would minority students be upset because she left them out? She didn't leave them out, I reminded her—the developer did; a point which she made when she described the group to whom these homes were offered. The real question here was whether she needed to tell these students that the exclusion of people of color was wrong, something which might not occur to them on their own.

One of the best attempts I have seen to parse through the problem of providing a remedy which explicitly recognizes the illegitimacy of a claim by those who are part of the dominant culture can be found in Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (May 1989). See also Randall Kennedy, *The Political Correctness Scare, The Sixth Annual Brendan Brown Lecture, April 15, 1991*, 37 LOY. L. REV. 231 (1991) (discussing the use of rhetoric by a conservative faculty member "inappropriately" describing as rape, the public criticism he received for alleged racially insensitive comments; see also the discussion of Clarence Thomas confirmation hearings and the use of "lynching" symbols, *infra* note 57).

45. See *supra* note 25 for a discussion of the "control" theory.

a club. Any resistance on his part will not be seen as heroic. The attempt to stay on his feet while being beaten will not be perceived as an example of his indomitable spirit. The reality we face, he and I, is one where black men who resist are not heroes. They are something to be feared.⁴⁶

I cried as I watched the violence erupt on the streets of Los Angeles. I cried as I watched and cringed as the foot of one young black man hit the head of a man we now know by name, Reginald Denny, who was lying prone on the street. The rioting was condemned. The violence and the brutality, the property damage, the arson and random destruction, the anarchy and lawlessness appalled millions of Americans and our President.⁴⁷

I cried because I recognized the rage of the rioters.⁴⁸ I have felt that anger. I know how deep it runs, how hot it burns and I am afraid. The last time I felt that anger, I was at home in the town where I grew up; in the town where my father was born and raised; where my grandmother was born; and where my great grandfather settled after he escaped from slavery. I brought my son home to see the town where I was born, to learn something about his family and his history.

One rainy day, I took my son and three young cousins, two boys and a girl, to the new art museum. Our first stop was the museum shop. My son, Chris, and my cousin, Marcus, were disappointed at the lack of selection. The museum shop in Auburn, New York suffered in comparison to the shops in the Metropolitan Museum of Art which we had visited just days earlier. As we turned to leave, Marcus was stopped by the attendant who had been hovering in the background while we ex-

46. One of the police officers referred to the "hulk-like" strength of King and the fact that after he had been forced to his knees, King rose to his full height of 6' 3"; even with one arm behind him about to be cuffed, and a foot on his neck, the "expert" witness called by the defense argued that there was subtle aggressive body language on King's part. Riley, *supra* note 24, at 17. See also discussion of the impression that he had abnormal strength, *supra* note 2.

47. "The wanton destruction of life and property is not a legitimate expression of outrage with injustice. It is itself injustice. And no rationalization, no matter how heartfelt, no matter how eloquent, can make it otherwise." *President Bush's Reaction to L.A. Riots*, CNN, Apr. 30, 1992, available in LEXIS, Nexis Library, Script file. Bruno Bettelheim discusses what it means to be civilized, an idea which he finds in the *Oresteia* by Aeschylus. That part of what we call "civilized" behavior is our willingness to give up violence as a means of enforcing a moral code. We accept as a replacement a process which involves communal justice. What happens if the communal process fails, if a part of the community feels that it is excluded from the process? It may be that with a break-down in communal justice, societies revert to the more basic methods of obtaining justice. Even if we cannot prove such a grand theory, there is support for the idea that individuals who are deprived of alternative means of achieving their aspirations will resort to violence. See BRUNO BETTELHEIM, *SURVIVING AND OTHER ESSAYS* 186, 193 (1980).

48. In the Milk documentary, there is a point where one man relates his experience walking in the candlelight march that took place after Milk and Mayor Moscone were murdered. The narrator describes a black man he saw standing at the curb, shaking his fist at the marchers and asking the crowd, "Where is your anger?" The city saw that anger when a jury rejected a murder verdict and convicted White of voluntary manslaughter. The scenes of the riot in San Francisco, a city where gay men had been brutalized by the police, showed violent confrontations between the police and the rioters, the destruction of property and arson. See *THE TIMES OF HARVEY MILK*, *supra* note 24.

amined postcards and trinkets. She accused him of stealing some small toy. Marcus looked bewildered. She didn't ask for anything; she merely accused him. He didn't know what to do.

Finally, I asked him to take his hands out of his pockets and show her that he did not have anything in them. Meekly he emptied his pockets. I am not sure that would have been enough if I hadn't looked around and located the toy. It was in plain view although it might not have been returned to the position it had occupied before we entered the shop. I assured the attendant in the my most professional tone of voice that if they wanted something, I would buy it for them. Of course, that wasn't true. What parent would buy her child anything he wanted? I just wanted to make it clear that they did not need to steal.

Kasha, the only girl among all those boys, followed me as I entered the museum. We moved directly into the room where the work of female artists was displayed. The boys went to the room with the sculptures. Kasha and I had about five minutes peace before Chris was back at my side. "Mom," he whispered, "that guard is following us everywhere we go." My first reaction was annoyance. I snapped at him, and told him and the other boys to sit down on some chairs that were set up before a television and VCR. It was irrelevant that the screen was blank. They would only have to sit a moment or two while I read the display that explained a Judy Chicago exhibit. I turned around to read and before I finished a sentence, Chris was at my elbow. The attendant had yelled at them for moving the chairs (which were on casters). I gave up all hope of seeing the exhibit and told the children to go out to the car.

I complained to the museum director's assistant because the director was not there. I was so angry; I had to work to keep my voice steady. In a virtual whisper, I explained my anger and disappointment. My children and I had been humiliated. We had been accused of theft and treated like potential vandals. It was intolerable. It was racist. In the background I saw another mother with two blond daughters in tow wandering around the museum. No one was bothering her or her children. The Assistant to the Director murmured a response. Her words were meant to soothe me. She explained that the attendant who had been hounding us was not concerned with race, she was concerned with age. Teenagers had caused problems in the museum in the past. Of course, it was all a misunderstanding. Apparently both the vigilant attendant and the guard had not been sufficiently discriminating. They should be concerned only when the teenagers are unaccompanied. She assured me that she would talk to them both about their failure to distinguish between the two situations.

Her words did not soothe me; they made me angrier. Chris was hovering in the background, watching how I handled this situation. There were tears in my eyes—tears of anger and frustration. I was not handling it well. As we left the museum, Chris muttered under his breath, "I would like to punch that lady in the mouth." Even as I told him no, that violence is not the right response, my whole being ached to

do the same. I was no different than the gang members rioting in Los Angeles. I wanted to cause that woman some pain. I wanted her to hurt as much as I hurt, as much as those children hurt. I was in pain and it was a pain that equaled or exceeded any physical pain I have ever experienced. I was angry at myself because I knew that my father would have caused a scene. He would have yelled and screamed at the injustice of the situation, and made so much noise that everyone in the museum would have known what was happening. My problem is my commitment to civility.

Most Americans were shocked by the brutal attack on innocent motorists during the most recent riots in Los Angeles; attacks on individuals who blundered into the wrong intersection at the wrong time.⁴⁹ White Americans are always shocked at the idea of collective guilt. It is an anathema to them.⁵⁰

49. The whites who were killed in Houston in 1917 were also people who blundered into a black neighborhood, the Fourth Ward, as the soldiers marched down San Felipe Street from Camp Logan. See Program from the Exhibit, *The Houston Riots and Court-Martial of 1917*, Carver Community Cultural Center, San Antonio, at 3 (on file with author). Although the soldiers marched with the intention of avenging the deaths of their comrades caused by the Houston police, they also fired on a number of persons who inadvertently surprised them. Perhaps because they were soldiers and they did, in fact, engage the enemy, the police and armed deputies, this is the one racial "riot" in U.S. history that resulted in more Whites dead than Blacks. *Id.*

50. See generally Jude P. Dougherty, *Collective Guilt*, 35 AM. J. JURIS. 1 (1990) (critique of collective guilt and a discussion of the history of the idea of collective guilt). The criticism is often leveled specifically at laws which are designed to remedy past discrimination. See, e.g., Mike Barnicle, *Justice Now Topsy-turvy*, BOSTON GLOBE, Aug. 23, 1990, at 33 (scathing indictment of the criminal justice system and lack of regard for issues of law and order which the author attributes to the abandonment of the principle of individual responsibility for something called "collective guilt."); Charles Bremner, *The Thought Police Closing Off the American Mind*, THE TIMES, Dec. 19, 1990, available in LEXIS, Nexis library, Major Newspapers File (an indictment of the diversity movement and reference to George Will's theory that the movement as a "function of the collective guilt generated in the 1960s and from which Americans still suffer, despite a decade of Reaganism"); *Reparations for African-Americans*, L.A. TIMES, Nov. 7, 1990, at B6 ("we had all better think carefully if we want to abandon the principle of individual responsibility in favor of collective guilt"); Edwin Yoder Jr., *Reynolds Deserves to Be Heard*, WASH. POST, May 17, 1983, at A19 ("The preferential theory of law carries the dubious corollary of hereditary or collective guilt.").

Justice Scalia takes the position that "ethnic whites" were not here during the period of slavery. He uses this historical fact to support his conclusion that "ethnic whites" are not responsible for the harm Blacks experienced as victims of slavery. Antonin Scalia, *Commentary: The Disease As Cure: In Order to Get Beyond Racism, We Must First Take Account of Race*, 1979 WASH. U. L.Q. 147, 151-52. He completely ignores the reality of assimilation; the fact that all immigrants quickly learn the lessons of their new homeland. Racism is a lesson learned along with the Pledge of Allegiance and the Bill of Rights. See Dwight Green et al., *Judicial Pluralistic Ignorance and the Myths of Colorless Individualism in Bostick v. Florida*, 67 TUL. L. REV. (forthcoming 1993).

When I was a teenager, I accompanied my half-sister when she went to look for apartments. We visited one house where an elderly woman who, if I was any judge of accents, had recently immigrated from Italy, showed us an apartment. She let us look, but she quickly advised us that she could not rent the apartment to us. "I only rent to Americans" she told us. I found it ironic that someone who had just arrived in this nation would question my right to be called an American. I had been born in that town; so had my father and my grandmother. This idea that somehow I was not a "real" American was something that just wouldn't go away. It happened to me again when I was an exchange student in Panama. I visited that country shortly after the riots in the Canal Zone in the 1960's. As we discussed who had a right to possess and control the Canal Zone, I sided with the Panamanian family (I was not sympathetic to a Southern command that forced

What is the idea of collective guilt if it is not a generalization? Here we find one more example of the logic that is peculiar to prejudice. Prejudice is supported by axioms; generalizations about the moral character and intellectual ability of groups of people who are different. Americans have no problem with generalizations which sustain inequality, only with the generalizations which assign blame for it. White-Americans do not want to believe that the result in the Rodney King decision was the result of racism.⁵¹ This is an example of the politics of denial. Denial is essential to the perpetuation of the myth of innocence. The politics of denial facilitate the use of terror and oppression by those who are overtly racist, anti-Semitic, sexist or homophobic.⁵² If you are the victim of prejudice and racism, some claims of innocence are incredible. I, for one, would not consider the police officers who watched the beating of Rodney King innocent. In fact, I believe that those who deny the reality of racism are as culpable as those who put it into practice.

The idea of collective guilt is not one which was invented by Blacks to justify the riots in Houston in 1917, Watts in 1965 or Los Angeles in 1992. The idea is one which is recurrent in the history of Western Europe. Those who profess a high regard for the literary canon might consider the lessons that can be learned there. In an effort to wean Chris from his addiction to the literary genre commonly known as fantasy sci-

Panamanians to comply with the Jim Crow laws they carried with them to the Zone). The other American who lived with the same family discredited my opinion by telling the family members that I was not a "real American."

The Daughters of the American Revolution and the descendants of the Southern planters are not the sole heirs of the legacy of slavery. We all share responsibility for the problem of racism. Though it might have its roots in the past, it is nourished and sustained in the present. Those who live with it, who fail to expose its ugliness and reveal the harm it causes and who tolerate its continued existence, are all guilty. See, e.g., Charles Krauthammer, *Collective Guilt, Collective Responsibility*, WASH. POST, May 3, 1985, at A5 (distinguishing the ideas of collective guilt and collective responsibility).

51. In Long Island, many Blacks blamed the verdict on racism, while whites blamed it on poor prosecution. Bessent, *supra* note 2, at 51.

52. Bruno Bettelheim has explored the phenomenon of denial in connection with the Holocaust and the behavior of both survivors of the camps and the German citizens who claimed not to have known about the concentration camps.

Denial is the earliest, most primitive, most inappropriate and ineffective of all psychological defenses used by man. When the event is potentially destructive, it is the most pernicious psychological defense, because it does not permit taking appropriate action which might safeguard against the real dangers. Denial therefore leaves the individual most vulnerable to the perils against which he has tried to defend himself.

BETTELHEIM, *supra* note 47, at 84.

Racism is dangerous to our society, and the response of both Blacks and Whites is often denial. Shelby Steele is a study in black denial. See generally STEELE, *CONTENT OF OUR CHARACTER*, *supra* note 25. The vitality and the persistence of racism is becoming harder and harder to deny. On my most recent visit to my home town, I learned that chapters of white extremist organizations had chosen that town as the location for their headquarters. Things had gotten so bad that a local newspaper editorial announced that they would no longer print the messages of hate contained in letters to the editor written by the most rabid member of one of these groups. See *No Hatred Allowed*, CITIZEN ADVERTISER, Oct. 11, 1992, at A4 ("We simply won't turn over our page to people who fail to express basic respect."). Bruno Bettelheim's point warned us that it is when the message is the strongest, when the threat is the most obvious, when the danger is the greatest that we chose to deny its very existence.

ence fiction, I asked him to read *A Tale of Two Cities*.⁵³ The second book on my list was the *Autobiography of Malcolm X*.⁵⁴ My choices might have been fortuitous, or there might have been some unconscious recognition on my part of the extent to which these same stories were being played out once again. As it turns out, the decision in the Rodney King case and the reaction in South Central Los Angeles made their relevance clear.

As Chris mentioned to me, the members of the street gangs in Los Angeles might have been called "Jacques" during the French Revolution. What Dickens described, we have witnessed first hand. We have seen the anger of people who have nothing to lose, people who have been so degraded and so dehumanized that they no longer value human life, their own or anyone else's. If Dickens were alive today, how would he regard the riots in Los Angeles and the reaction to them? Perhaps he would have recognized a similarity between the failure of the English to acknowledge that the seeds of the revolution were sewn by the French aristocracy and the assertion here that the abject poverty experienced in the inner cities does not justify the riots.⁵⁵ This is not a matter of justification. What is being offered is an explanation. It is a case of cause and effect. Or, in the words of Malcolm X, it is a case of chickens coming home to roost.⁵⁶

53. CHARLES DICKENS, *A TALE OF TWO CITIES* (Bantam 1984) (1842). In his interpretive afterword, Stephen Koch analyzes Dickens' attitude towards revolution and the "lucid blindness that sees nothing but the oppression they need to sustain their rage—and their new found omnipotence." Stephen Koch, *Afterword* to CHARLES DICKENS, *A TALE OF TWO CITIES* 359 (Bantam 1984) (1842). In his opinion, "The dominating political innovation of our time has been Terror's fully organized expression of totalitarianism, whose primary moral innovation has been to fully institutionalize Terror's rationale: collective guilt." *Id.* at 360.

I find it difficult to accept his premise that the collective guilt argument which has been applied to Germany since World War II and any version of "collective guilt" that might have been used by the Nazis to justify the program of genocide as one in the same. In my opinion that the idea of collective guilt is appropriate in the former case and not in the latter. While collective guilt may provide a rationale for purges and putsches by "revolutionary" regimes in Russia and China, including the "cultural" revolution in China. If oppression sustains rage, then it seems clear to me that an end to oppression would mean an end to the "dreams of vengeance" that sustain revolutionaries.

54. MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* (Ballentine 1983) (1964) (with the assistance of Alex Haley).

55. I have always liked Dickens, perhaps because he evidences class consciousness that appeals to me as a daughter of the working class. Only recently I learned that he was also a critic of slavery. Charles Dickens, *AMERICAN NOTES* (St. Martin's Press 1985) (1842). My research assistant, Caroline Green, who must receive credit for finding this book for me, was excited by the technique Dickens used to criticize the institution of slavery. He printed advertisements that appeared in public papers offering rewards for news of runaway slaves. Dickens used these ads to ridicule the institution of slavery and to destroy the myths that supported it. *Id.* at 273. The ads described men, women and children marked with iron collars, scars from lashings, marks from a hot iron on a face, a piece cut out of an ear or a brand marking him or her as property. *Id.* at 274-76. It is interesting to note that while we no longer suffer the mark of a brand that might be found on cattle rather than humans, we might still be stunned by 50,000-volt stun guns. See Riley, *supra* note 24, at 16.

56. Malcolm X later explained the statement which caused so much controversy: "I said what I honestly felt—that it was, as I saw it, a case of 'the chickens coming home to roost.' I said that the hate in white men had not stopped with the killing of defenseless

I could not have done what the gang members in Los Angeles did. I am a lawyer, and I respect the law. I have been taught to act with civility and human decency. That is the way I try to live my life. That is what I try to teach Chris. I have not acted on my anger because, unlike the young people in Los Angeles, I have something to lose. Human life means something to me because my life has meaning. The policies of the Great Society provided me with a good place to live, at one point in public housing, and a means of acquiring an education. I have a profession which I might not have but for the interest in diversity and the assignment of a positive value to race, in other words, affirmative action. I am raising my son in a radically different environment. Affirmative action is under attack, not by those truly committed to some concept of a meritocracy but by those who employ a system of political patronage.⁵⁷ The political ideology of the right panders to racial fears. Much of the progress I witnessed has been reversed during the Reagan/Bush years. In my short lifetime, I have witnessed the best and the worst of the human spirit respectively in the attempts to eliminate, and later to preserve, social and economic inequality.

There is a chill in the air, and I pull my blanket of optimism closer around me. I continue to believe that most human beings are decent and kind and that they can change. I believe that most people are capable of generosity of spirit and a genuine concern for those who are less fortunate, and that these are values which are part of the fabric of our society. I know that there are people who are actively working to change the world and eliminate unfairness, injustice and inequality. Yet it is harder and harder to keep out the cold wind that has begun to blow, and in moments of reverie, my mind turns to *Madam Defarge*. I have begun to understand this most unsympathetic and unappealing character. I understand the source of her bitterness and her anger. I almost begin to understand her insatiable desire for revenge.⁵⁸ I wonder whether ultimately the fear of young black men is misplaced. Perhaps the person to

black people, but that hate, allowed to spread unchecked, finally had struck down this country's Chief of State." MALCOLM X, *supra* note 54, at 301.

57. Anyone who thought that this was a fight about meritocracy learned otherwise when Clarence Thomas was nominated for the Supreme Court. President Bush described Thomas as the best qualified candidate for the job. Most of us suspected that the qualifications to which he referred were something other than the credentials as a jurist or as a scholar in the field of constitutional law. If for no other reason, the Senate should have had some reservations about confirming a man who could not keep up with the developments in an area of law enforced by an agency which he headed. How knowledgeable could he be if he delegated all responsibility for reading federal court decisions in the area of civil rights, including a circuit court decision discussing sexual harassment, to a subordinate? See Reuters, *The Supreme Court: Excerpts From News Conference Announcing Court Nominee*, N.Y. TIMES, July 2, 1991, at A14.

58. Dickens' feminization of the guillotine reinforced his image of woman as a vengeful spirit and animates his creation, *Madam Defarge*. Stephen Koch, *supra* note 53, at 360-61. Lucie Manet is a stereotype of the Victorian concept of womanhood, all gentility and perfect loyalty to father, husband and children. *Madam Defarge* may be a stereotype as well, but by the time Dickens finishes telling us about the atrocities which occurred at the hands of the French aristocracy, of the horrible death of the members of *Madam Defarge's* family, her strength seems all the more admirable, and her desire for retribution is understandable.

fear is the mother of the young black man.⁵⁹

59. I would like to point out, for those who might not have thought about this possibility, that some of the mothers of young black men are white women. My anger at the treatment Marcus received at the museum gift shop was shared by my cousin through marriage, M'Lynn Kenny, who is white.

